IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-878

EDWARD MAHER, Commissioner of Social Services for the State of Connecticut,

Appellant,

—v.—

DONNA DOE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF *AMICUS CURIAE* OF THE STATE OF ALASKA

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This brief *amicus curiae* is submitted by the State of Alaska pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. *Amicus* urges the Court to summarily affirm the judgment below.

In the alternative, should the Court be inclined to note probable jurisdiction and schedule plenary consideration, *amicus* urges that this case be heard together with *Jane Coe et al.* v. *F. David Mathews,* in which a petition for *certiorari* before judgment will be filed by *amicus* and others by January 17, 1977.[1] As will be discussed *infra,*

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[1] *Coe* v. *Mathews* was decided on November 23, 1976 by the District Court in the District of Columbia. An appeal was docketed on December 16, 1976 in the Court of Appeals for the D.C. Circuit. No. 76-2118.

amicus joined as co-plaintiff in *Coe* v. *Mathews* with five welfare recipients and the National Welfare Rights Organization to challenge regulations of the Secretary of Health, Education, and Welfare which are directly called into question by the appeal in this case.[2]

Statement of Interest

Amicus State of Alaska administers the Aid to Families With Dependent Children (AFDC) program established by Title IV of the Social Security Act through its Department of Health and Social Services. As a state participating in the AFDC program Alaska is required to comply with the various conditions placed upon it by Congress and by the Secretary of Health, Education, and Welfare (HEW) in order to qualify for the substantial federal financial contribution towards the costs of its AFDC program. Alaska presently receives approximately $7,000,000 yearly from the United States, or 50% of its total AFDC costs.

One statutory condition placed on the receipt of federal funds is that each state's AFDC plan must provide that applicants for or recipients of AFDC must, as a condition of eligibility, cooperate with the state in establishing the paternity of children born out of wedlock, and in securing support for those other children who qualify for aid because of the absence of a parent from the home, unless

[2] Co-counsel for Alaska also represents the co-plaintiffs in *Coe* v. *Mathews*, mothers and children who are being forced to cooperate with child support enforcement efforts because of HEW's regulations despite substantial fears that such cooperation will cause them serious injury, and can advise the Court that all plaintiffs in *Coe* urge the summary affirmance of the decision of the three judge court below.

such cooperation is excused for "good cause." Section 402 (a) (26) (B) of the Social Security Act, 42 U.S.C. §602(a) (26) (B), as amended by Pub. L. 94-88, §208(a) (August 9, 1975). Section 402(a) (26 (B) specifically provides that the determination of "good cause" must be made by each state agency administering the Title IV-A AFDC program "in accordance with standards prescribed by the Secretary [of HEW], which standards shall take into consideration the best interests of the child on whose behalf aid is claimed."[3] The standards referred to in §402(a) (26) (B) have not been promulgated in final form, although proposed rules were published on August 13, 1976.[4]

In the absence of regulations implementing §402(a) (26) (B), currently effective regulations of the Secretary of Health, Education, and Welfare require the states to impose child support enforcement cooperation as a condition of eligibility *without* application of the "good cause" excep-

[3] A closely related statutory requirement for the receipt of federal AFDC funds is that each state operate a child support enforcement program under Title IV-D of the Act. Section 402(a) (27) of the Social Security Act, 42 U.S.C. §602(a) (27). Title IV-D, in turn, requires, *inter alia*, that each state establish a child support enforcement agency, 42 U.S.C. §654(3), and that such agency undertake to establish the paternity of illegitimate children and enforce support obligations owed to all AFDC children "unless the agency administering the plan of the State under part A of this title determines in accordance with the standards prescribed by the Secretary pursuant to section 402(a) (26) that it is against the best interests of the child to do so. . . ." 42 U.S.C. §654(4) (A) and (B), as amended by Pub. L. 94-88, §208(b), (c).

[4] 41 Fed. Reg. 34298. Approximately 1500 comments were received by HEW as a result of the notice of proposed rulemaking and it is very unlikely, as appellant Maher indicates, that final rules can be expected very soon. Even after publication of final rules, an additional 60 day period must lapse before they can become effective during which time Congress may exercise a "veto" power over the rules. Pub. L. 94-88, §208(d).

tion, 45 C.F.R. §232.12 (June 26, 1975).[5] HEW has advised Alaska and other states that they are not free to adopt their own "good cause" standards pending promulgation of the mandated HEW standards.[6]

The State of Alaska believes that, despite these HEW regulations, it is not required by the Social Security Act to require AFDC applicants and recipients to cooperate in establishing paternity and securing support, nor is it required to establish paternity and secure support, until that statutory requirement is *fully* implemented by the

[5] HEW Regulations also require state child support agencies under Title IV-D to establish paternity and secure support despite the absence of the standards required by Pub. L. 94-88 for determining the "best interests of the child." See 45 C.F.R. §§302.31, 303.4, 5, 6. HEW rules do permit the states a very limited exception to the establishment of paternity requirement, 45 C.F.R. §303.5, but that exception was rejected as inadequate by Congress in Pub. L. 94-88. See *infra*, p. 12.

[6] We note appellees' reference in their motion to appellant's failure to promulgate "best interest" standards allegedly required by state law. (Motion to Dismiss or Affirm, p. 12.) It is clear that appellant's failure to promulgate such rules is not culpable, however, but is the necessary consequence of current HEW policy. That policy, required by the clear language of §402(a) (26) (B) providing for HEW promulgation of "best interest" standards, bars appellant, just as it bars Alaska, from issuing best interest standards prior to HEW's issuance of such standards under Pub. L. 94-88. Indeed, the appellant is generally under a state statutory duty to promulgate such rules as may be necessary to conform to federal requirements for the receipt of AFDC matching funds, C.G.S.A. §17-83(a), and thus even under state law appellant may not issue the best interest standards until HEW completes its responsibilities under Pub. L. 94-88. Once HEW's "best interest" standards are issued, however, appellant will be in a position to promptly institute the cooperation requirement since the terms of the order below will be satisfied, and since Connecticut law requires issuance of such state implementation of the federal standards on an emergency basis, without the usual notice and comment rulemaking provisions of state law. See Public Act 76-334, and C.G.S.A. §168(b).

promulgation, in final form, of the standards under which the "good cause/best interest" finding is to be made. The State firmly believes that the best interests of children receiving AFDC assistance should be protected in any scheme for requiring cooperation in the identification and location of absent parents and the collection of child support from those parents. Accordingly, the State does not wish to implement any mandatory cooperation requirements until the HEW guidelines required by Pub. L. 94-88 to protect the best interests of the child have been adopted by HEW. The existing guidelines, at 45 C.F.R. §303.5, which were specifically rejected by Congress and in any event only apply to paternity actions, do not adequately protect those best interests in Alaska.

Because of the State's unwillingness to implement the HEW regulations[7] it has subjected itself to a substantial risk that it will either lose all of its future federal funding for its AFDC program, 42 U.S.C. §604(a), or suffer a substantial retrospective financial penalty, 42 U.S.C. §§603 (h), 604(d). In order to protect itself from such risks, and in order to protect the interests of those mothers and children it seeks to serve through its AFDC program, Alaska filed suit against HEW Secretary Mathews seeking declaratory and injunctive relief against the continued enforcement of the HEW regulations referred to above. That suit, *Coe* v. *Mathews*, was decided in the defendant's favor by the District Court for the District of Columbia (Corcoran, J.) on November 23, 1976, in a decision directly

[7] Alaska has implemented the child support program on a voluntary basis, permitting AFDC applicants and recipients to excuse themselves from cooperation simply by indicating to the welfare agency that they believe cooperation would be against their child's interests.

contrary to the decision in the instant case. Had the reasoning and order of the court below been applied by the *Coe* court, *amicus* would be freed of the responsibility for implementing the federal regulations challenged in *Coe*. The Court's decision on the appeal in this case will thus be determinative of *amicus'* rights being litigated in *Coe* v. *Mathews*,[8] and thus *amicus* has a direct and substantial interest in the outcome of this case.

ARGUMENT

I.

The judgment below should be summarily affirmed.

As is set forth in the Jurisdictional Statement and Motion to Dismiss or Affirm, this case has had a long judicial history. As originally filed, this case challenged a Connecticut statute (C.G.S.A. §52-440b) under which unwed mothers were held in contempt of court if, upon being subpoenaed, they refuse to disclose the paternity of their children. The three judge court upheld the state statute under various constitutional and federal statutory attacks, 365 F. Supp. 65, and plaintiffs appealed to this Court.

Subsequent to this decision Congress enacted Pub. L. 93-647, providing, *inter alia*, that AFDC programs must condition the mother's eligibility for AFDC on her willingness to cooperate. See §402(a) (26) (B), as added, 88 Stat. 2359.[9] This Court, noting that the new federal statute had

[8] Because the decision herein will be determinative of the issues in *Coe, amicus* and its co-plaintiffs in *Coe* will seek summary reversal of the *Coe* decision in the petition for *certiorari* to be filed.

[9] Such state rules were theretofore inconsistent with the Social Security Act. See *Lascaris* v. *Shirley*, 420 U.S. 730 (1975). Connecticut had been enjoined from imposing a "cooperation" eligibility rule prior to *Lascaris*. See *Doe* v. *Shapiro*, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970); *Doe* v. *Harder*, 310 F. Supp. 302 (D. Conn.), *appeal dismissed*, 399 U.S. 902 (1970).

no sanction that was comparable to Connecticut's contempt penalty, vacated the judgment of dismissal and remanded for consideration, *inter alia*, of the effect of Pub. L. 93-647. *Roe* v. *Norton*, 422 U.S. 391 (1975). On remand, the court below reiterated its dismissal of the constitutional claims, and further ruled that Congress had not intended to preempt Connecticut from applying a supplementary sanction to that imposed by the federal child support statute. 414 F. Supp. 1368. These rulings were not appealed to this Court.

Subsequent to the remand in this case, Connecticut began to impose a cooperation requirement as a condition of eligibility based on the HEW regulations noted above.[10] However, also subsequent to the remand Congress enacted Pub. L. 94-88, which took effect at the same time as Pub. L. 93-647. As noted above, this legislation provided an exception to the cooperation requirement where the mother had good cause for refusing to cooperate, and required the states to determine "good cause" under standards required to be promulgated by the Secretary of HEW which were to "take into consideration the best interests of the child on whose behalf aid is claimed." The court below ruled, on the remand, that both the original contempt sanction and eligibility sanctions were subject to this statutory amendment.

The three judge court ruled that appellant Maher may not, consistent with the Social Security Act, terminate the

[10] Connecticut Department of Social Services Public Assistance Program Manual, §404.6 (eff. Nov. 1, 1975).

eligibility of appellee AFDC mothers because of their failure to cooperate in establishing the paternity of their children. While the court recognized that Congress has authorized such a state-imposed eligibility requirement in §402(a) (26) (B), it held that the federal statutory authorization could "not be enforced in a manner contrary to the best interests of the very children whom the AFDC program is intended to assist", and that since the HEW standards required by Pub. L. 94-88 for determining whether such enforcement would be contrary to the child's best interests were not yet in effect, it ruled that appellant must "postpone any enforcement until the new regulations have been issued and approved." *Doe* v. *Maher*, 414 F. Supp. at 1381, n. 20.[11]

Connecticut has appealed from the order to the extent that it requires postponement of the cooperation eligibility requirement. The State wishes to enforce the cooperation requirement originally established by Pub. L. 93-647 despite the fact that the requirement has not been fully implemented by HEW as required by Pub. L. 94-88.[12] The State wishes to provide only those limited exceptions to the cooperation requirement as are now provided for in

[11] Thus, the order of the lower court was that appellant

"shall not remove plaintiff mothers from the status of eligibility . . . until after full compliance with the provision of Section 402(a) (26) of the Social Security Act as amended. . . ." Juris. Statement, p. 37.

Such "full compliance " would, of course, require a "best interest" determination under HEW's yet to be issued standards.

[12] The Appellant does not complain that the contempt sanction was required to be applied consistent with the condition in §402(a) (26) (B) for applying the eligibility sanction. The dispute is over whether or not §402(a) (26) (B) itself is operative so as to authorize *either* the contempt *or* eligibility sanction at this time.

45 C.F.R. §303.5, the regulation based on Pub. L. 93-647 and specifically rejected by Congress' enactment of Pub. L. 94-88.

Amicus is of the view that the portion of the decision below which has been appealed to this Court is so clearly correct that summary affirmance, as requested by appellees, is in order.[13] *Amicus* does not believe it is required to im-

[13] In this regard, *amicus* believes that affirmance, rather than dismissal, is appropriate because the Court has jurisdiction over the appeal under 28 U.S.C. §1253. Appellees contend that since the injunction entered by the three-judge court could have been entered by a single judge, since it was based on Supremacy Clause grounds, the appeal properly lies in the Court of Appeals under this Court's decision in ***MTM*** v. ***Baxley***, 420 U.S. 799 (1975). *Amicus* disagrees. ***MTM*** did not involve an appeal from a decision on the merits, or from a decision granting injunctive relief, as does this case, and thus the decision in ***MTM*** does not require dismissal of this appeal. Further, only 5 days prior to the ***MTM*** decision this Court accepted jurisdiction over an appeal under §1253 in ***Lascaris*** v. ***Shirley***, 420 U.S. 730 (1975), a case in which another state's "cooperation" requirement had been enjoined by a three-judge court on Supremacy Clause grounds. Shortly after ***MTM*** the Court expressly declined to apply ***MTM*** to an appeal under §1253 of a three judge court injunction issued on Supremacy Clause grounds, after requesting re-briefing on the issue because of the intervening ***MTM*** decision. ***Philbrook*** v. ***Glodgett***, 420 U.S. 707 (1975). Moreover, we note that while the Court has indicated that Supremacy Clause issues should preferably be decided by a single judge court, ***Hagans*** v. ***Lavine***, 415 U.S. 528 (1974), this was not a case in which such a course was desirable. The three-judge court was originally convened prior to the ***Hagans*** decision, 356 F. Supp. 202, and, moreover, the Supremacy Clause injunction which was issued after this Court's remand could not have resolved, and did not in fact resolve, the substantive constitutional claims, see 414 F. Supp. at 1381. Cf. ***Hagans*** v. ***Lavine, supra,*** 415 U.S. at 544-45. Therefore, judicial economy properly called for a three-judge court resolution of the case. In sum, since a three-judge court had the power to hear the entire case, and in fact properly exercised that power, an appeal lies directly in this Court, despite the fact that the basis for the relief was the Supremacy Clause. See ***Philbrook*** v. ***Glodgett, supra; Engineers*** v. ***Chicago, R.I. & P.R. Co.,*** 382 U.S. 423 (1966); ***Florida Lime & Avacado Growers,***

plement the cooperation requirement until it can be fully implemented with the HEW "best interest" exception, and thus believes it is entitled to be in the same position Connecticut finds itself in, albeit against its will, as a result of the order below. The reasons for *amicus'* position will be set out in detail in the petition for *certiorari* before judgment that will be filed in *Coe* v. *Mathews* by January 17, 1977. Our position is summarized below.

This Court has recently held that state AFDC programs may not, consistent with the Social Security Act, condition eligibility for aid on the willingness of the caretaker relative of the children to cooperate with the state in establishing the paternity of children born out of wedlock and in securing child support owed to the children. *Lascaris* v. *Shirley,* 420 U.S. 730 (1975), *affirming,* 365 F. Supp. 818 (N.D.N.Y.) (3 judge court). The Court's reliance on its prior decisions in *Townsend* v. *Swank,* 404 U.S. 282 (1971) and *Carleson* v. *Remillard,* 404 U.S. 598 (1972), see *Lascaris* v. *Shirley, supra,* 420 U.S. at 732, indicated this Court's agreement with the district court that such a condition of eligibility was illegal in that it was not authorized by Congress and thus operated to deny aid to "eligible individuals" contrary to §402(a) (10) of the Social Security Act, 42 U.S.C. §602(a) (10). The Court noted in *Lascaris,* however, that Congress had acted to resolve the conflict by requiring "cooperation" as an eligibility condition in Pub.

Inc. v. *Jacobsen,* 326 U.S. 73 (1960). Indeed it is fortuitous that appellees did not appeal the denial of relief on their substantive constitutional claims, for had they done so, a dismissal of this appeal by the State would have meant that the case would be heard in this Court and the Court of Appeals simultaneously, with subsequent review in this Court on the Supremacy Clause claim. Such a procedure hardly comports with judicial economy.

L. 93-647, adding §402(a) (26) (B) to the Act, scheduled to take effect on July 1, 1975.

The statutory resolution of the conflict between state and federal law noted in *Lascaris* did *not* take effect as scheduled, and as assumed in the *Lascaris* decision, however. Thus, the *Lascaris* decision quite properly bars Connecticut from terminating eligibility based on the failure to cooperate in establishing paternity, which is precisely what the lower court ordered. That Congress' authorization for such cooperation requirements is not yet effective, and that *Lascaris* still governs, is readily apparent from the following:

1. In direct response to widespread dissatisfaction with major parts of the new child support legislation, especially the cooperation requirement, Congress postponed the effective date of the legislation (including §402(a)(26)(B)) from July 1, 1975 to August 1, 1975. Pub. L. 94-46.

2. Promptly after such suspension, legislation was introduced and enacted to provide for the exception to the cooperation requirement where the mother or other caretaker had "good cause." Pub. L. 94-88, §208. This amending legislation was perceived by its authors as correcting a "serious flaw" in the program which "unless corrected, could cause an irreparable damage to children and mothers." 121 Cong. Rec. H7141 (July 21, 1975) (daily ed.) (Remarks of Rep. Corman). Rep. Corman expressed the concern that *"Federal law should not cause harm* in such a process to the same children we are attempting to help through a strengthened program of enforcement of child support." *Ibid.* (emphasis added). The Ways and Means

Committee specifically indicated that it was concerned about the possibility that tracking down the absent parent might lead to "substantial danger or physical harm or undue harassment." H. Rept. 94-368, 94th Cong., 1st Sess. (1975), at 7. The Committee noted that it "did not feel that the subject had been sufficiently covered in regulations developed by the Department of HEW." *Ibid.*[14]

3. In order to correct the "flaw" in the original legislation, and to prevent the "irreparable damage" threatened by the new child support requirements, the effective date of the "exception" was deliberately chosen by Congress to coincide with the new effective date of the original legislation, namely August 1, 1975. Pub. L. 94-88, §210. See, e.g., 121 Cong. Rec. H7145 (July 21, 1975) (daily ed.); H. Rept. 94-368, 94th Cong., 1st Sess. (1975), at 8, 13.

In sum, the court below correctly required the postponement of implementation of the cooperation requirement until it can be *fully* implemented, with the "best interest" exception. *Amicus* is of the view that, like Connecticut, it too ought to be permitted to postpone implementation until the interests of the AFDC children, intended by Congress to be protected by and aided by the child support program, may be fully protected.

[14] The discredited regulations referred to by Congress are those at 45 C.F.R. §303.5, the same regulations which appellant *Maher* complains the lower court has not permitted him to implement.

II.

If probable jurisdiction is noted this case should be heard with *Coe* v. *Mathews*.

If the Court does not affirm the judgment below summarily, *amicus* suggests that it would be advisable for the forthcoming petition for *certiorari* before judgment in *Coe* v. *Mathews*, to be granted, and the cases set down for argument together. As will be fully set out in the *Coe* petition, the issues raised in this case and *Coe* are identical, and the presence before the Court of HEW Secretary Mathews as a Respondent will enable the Court to better resolve the question as to the validity of the HEW regulations, which were, in effect, invalidated by the decision below. Moreover, prompt consideration of the two cases at the same time will permit the Court to finally resolve these important federal statutory questions for all states administering the AFDC program, not just Connecticut.

CONCLUSION

The judgment below should be affirmed. If probable jurisdiction is noted or postponed, the case should be heard together with *Coe* v. *Mathews*, in which a petition for *certiorari* before judgment will be filed by January 17, 1977.

January , 1977.

Respectfully submitted,

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